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 12

13 UNITED STATES DISTRICT COURT

14 SOUTHERN DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,	)	Case No. 08CR1811-WQH
	)	
16 Plaintiff,	)	DATE: July 21, 2008
	)	TIME: 2:00 p.m.
17 v.	)	
	)	GOVERNMENT'S RESPONSE TO
18 ANGEL RIOS,	)	DEFENDANT'S MOTIONS TO:
	)	
19	)	(1) DISMISS THE INDICTMENT
	)	FOR GRAND JURY VIOLATION;
20	)	(2) COMPEL DISCOVERY AND
	)	PRESERVE EVIDENCE; AND
21	)	(3) LEAVE TO FILE ADDITIONAL
	)	MOTIONS
22 Defendant.	)	
	)	
23	)	

24 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and  
 25 through its counsel, Karen P. Hewitt, United States Attorney, and  
 26 Peter J. Mazza, Assistant United States Attorney, and hereby files  
 27 its response to Defendant ANGEL RIOS's ("Defendant") motions to  
 28 dismiss the indictment for grand jury violations, compel  
 discovery, and leave to file additional motions. Said response is  
 based upon the files and records of this case, together with the  
 attached statement of facts and accompanying memorandum of points  
 and authorities.

## I

STATEMENT OF THE CASEA. THE CHARGE

On May 30, 2008, a grand jury sitting in the Southern District of California returned a two-count Indictment charging Defendant with bringing in illegal aliens for financial gain and aiding and abetting and bringing in illegal aliens without presentation and aiding and abetting. On June 5, 2008, Defendant was arraigned on the Indictment.

B. STATUS OF DISCOVERY

To date, the Government has produced all discoverable material related to this case in its possession and will continue to do so in accordance with the applicable rules of discovery.

## II

STATEMENT OF FACTS

In his motion addressed herein, Defendant does not raise any factual issues. Therefore, the Government relies upon the reports provided to counsel in discovery to provide a factual basis for this response and opposition.

## III

POINTS AND AUTHORITIESA. THE GRAND JURY WAS NOT MISINSTRUCTED

Defendant moves to dismiss the indictment against him for alleged errors in the Judge Burns's instruction of the grand jury panel. The United States explicitly incorporates by reference the briefing on this issue submitted in United States v. Bermudez-

1 Jimenez, 07CR1372-JAH, and United States v. Martinez-Covarrubias,  
2 07CR0491-BTM. The orders, denying this same motion, are attached  
3 as Exhibits 1 and 2. This motion has been denied by every court  
4 to consider it, and the Court should deny it in this instance as  
5 well. However, if the Court would like additional briefing, the  
6 United States will oblige.

7 **B. DISCOVERY**

8 **1. Items Which The Government Has Already**  
9 **Provided Or Will Voluntarily Provide**

10 a. The Government will disclose to Defendant and  
11 make available for inspection, copying or photographing: any  
12 relevant written or recorded statements made by Defendant, or  
13 copies thereof, within the possession, custody, or control of the  
14 Government, the existence of which is known, or by the exercise of  
15 due diligence may become known, to the attorney for the  
16 Government; and that portion of any written record containing the  
17 substance of any relevant oral statement made by Defendant whether  
18 before or after arrest in response to interrogation by any person  
19 then known to Defendant to be a Government agent. The Government  
20 will also to Defendant the substance of any other relevant oral  
21 statement made by Defendant whether before or after arrest in  
22 response to interrogation by any person then known by Defendant to  
23 be a Government agent if the Government intends to use that  
24 statement at trial.

25 b. The Government will permit Defendant to  
26 inspect and copy or photograph books, papers, documents,  
27 photographs, tangible objects, buildings or places, or copies or

1 portions thereof, which are within the possession, custody or  
2 control of the Government, and which are material to the  
3 preparation of Defendant's defense or are intended for use by the  
4 Government as evidence during its case-in-chief at trial, or were  
5 obtained from or belong to Defendant;<sup>1/</sup>

6 c. The Government will permit Defendant to  
7 inspect and copy or photograph any results or reports of physical  
8 or mental examinations, and of scientific tests or experiments, or  
9 copies thereof, which are in the possession, custody or control of  
10 the Government, the existence of which is known, or by the  
11 exercise of due diligence may become known, to the attorney for  
12 the Government, and which are material to the preparation of his  
13 defense or are intended for use by the Government as evidence  
14 during its case-in-chief at trial;<sup>2/</sup>

15 d. The Government has furnished to Defendant a  
16 copy of his prior criminal record, which is within its possession,  
17 custody or control, the existence of which is known, or by the  
18 exercise of due diligence may become known to the attorney for the  
19 Government;

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20  
21 <sup>1/</sup> Rule 16(a)(1)(C) authorizes defendants to examine only  
22 those Government documents material to the preparation of their  
23 defense against the Government's case-in-chief. United States v.  
24 Armstrong, 116 S. Ct. 1480 (1996). Further, Rule 16 does not  
require the disclosure by the prosecution of evidence it intends  
to use in rebuttal. United States v. Givens, 767 F.2d 574 (9th  
Cir. 1984), cert. denied, 474 U.S. 953 (1985).

25 <sup>2/</sup> The Government does not have "to disclose every single  
26 piece of paper that is generated internally in conjunction with  
27 scientific tests." United States v. Iglesias, 881 F.2d 1519  
(9th Cir. 1989), cert. denied, 493 U.S. 1088 (1990).

1 e. The Government will disclose the terms of all  
2 agreements (or any other inducements) with cooperating witnesses,  
3 if any are entered into;

4 f. The Government may disclose the statements of  
5 witnesses to be called in its case-in-chief when its trial  
6 memorandum is filed;<sup>3/</sup>

7 g. The Government will disclose any record of  
8 prior criminal convictions that could be used to impeach a  
9 Government witness prior to any such witness' testimony;

10 h. The Government will disclose in advance of  
11 trial the general nature of other crimes, wrongs, or acts of  
12 Defendant that it intends to introduce at trial pursuant to Rule  
13 404(b) of the Federal Rules of Evidence;

14  
15  
16  
17 <sup>3/</sup> Production of these statements is governed by the Jencks  
18 Act and need occur only after the witness testifies on direct  
19 examination. United States v. Mills, 641 F.2d 785, 789-790 (9th  
20 Cir.), cert. denied, 454 U.S. 902 (1981); United States v.  
21 Dreitzler, 577 F.2d 539, 553 (9th Cir. 1978), cert. denied, 440  
22 U.S. 921 (1979); United States v. Walk, 533 F.2d 417, 418-419 (9th  
23 Cir. 1975). For Jencks Act purposes, the Government has no  
24 obligation to provide the defense with statements in the  
25 possession of a state agency. United States v. Durham, 941 F.2d  
26 858 (9th Cir. 1991). Prior trial testimony does not fall within  
27 the scope of the Jencks Act. United States v. Isigro, 974 F.2d  
1091, 1095 (9th Cir. 1992). Further, an agent's recorded radio  
transmissions made during surveillance are not discoverable under  
the Jencks Act. United States v. Bobadilla-Lopez, 954 F.2d 519  
(9th Cir. 1992). The Government will provide the grand jury  
transcripts of witnesses who have testified before the grand jury  
if said testimony relates to the subject matter of their trial  
testimony. Finally, the Government reserves the right to withhold  
the statement of any particular witness it deems necessary until  
after the witness testifies.

i. The Government acknowledges and recognizes its continuing obligation to disclose exculpatory evidence and discovery as required by Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), Jencks and Rules 12 and 16 of the Federal Rules of Criminal Procedure, and will abide by their dictates.<sup>4/</sup>

**2. Items Which Go Beyond The Strictures Of Rule 16**

**a. The Requests By The Defendants For Specific Brady Information Or General Rule 16 Discovery Should Be Denied**

Defendant requests that the Government disclose all evidence favorable to him, which tends to exculpate him, or which may be relevant to any possible defense or contention they might assert.

It is well-settled that prior to trial, the Government must provide a defendant in a criminal case with evidence that is both favorable to the accused and material to guilt or punishment. Pennsylvania v. Richie, 480 U.S. 39, 57 (1987); United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83, 87 (1963). As the Court explained in United States v. Agurs, 427 U.S. 97, 104 (1976), "a fair analysis of the holding in Brady

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<sup>4/</sup> Brady v. Maryland requires the Government to produce all evidence that is material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963). The Government's failure to provide the information required by Brady is constitutional error only if the information is material, that is, only if there is a reasonable probability that the result of the proceeding would have been different had the information been disclosed. Kyles v. Whitley, 115 S. Ct. 1555 (1995). However, neither Brady nor Rule 16 require the Government to disclose inculpatory information to the defense. United States v. Arias-Villanueva, 998 F.2d 1491 (9th Cir. 1993).

1 indicates that implicit in the requirement of materiality is a  
2 concern that the suppressed evidence may have affected the outcome  
3 of the trial." Thus, under Brady, "evidence is material only if  
4 there is a reasonable probability that, had the evidence been  
5 disclosed to the defense, the result of the proceeding would have  
6 been different." United States v. Bagley, 473 U.S. 667, 682  
7 (1985) (emphasis added). A "reasonable probability" is a  
8 probability sufficient to undermine confidence in the outcome.  
9 Pennsylvania v. Richie, 480 U.S. at 57 (quoting United States v.  
10 Bagley, 473 U.S. at 682).

11 The Supreme Court has repeatedly held that the Brady rule is  
12 not a rule of discovery; rather, it is a rule of fairness and is  
13 based upon the requirement of due process. United States v.  
14 Bagley, 473 U.S. at 675, n. 6; Weatherford v. Bursey, 429 U.S. at  
15 559; United States v. Agurs, 427 U.S. at 108. The Supreme Court's  
16 analysis of the limited scope and purpose of the Brady rule, as  
17 set forth in the Bagley opinion, is worth quoting at length:

18 Its purpose is not to displace the adversary system as the  
19 primary means by which truth is uncovered, but to ensure that  
20 a miscarriage of justice does not occur. [footnote omitted].  
Thus, the prosecutor is not required to deliver his entire  
file to defense counsel,<sup>5/</sup> but only to disclose evidence

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21  
22 <sup>5/</sup> See United States v. Agurs, 427 U.S. 97, 106 (1976);  
23 Moore v. Illinois, 408 U.S. 786, 795 (1972). See also California  
24 v. Trombetta, 467 U.S. 479, 488, n. 8 (1984). An interpretation  
25 of Brady to create a broad, constitutionally required right of  
26 discovery "would entirely alter the character and balance of our  
present system of criminal justice." Giles v. Maryland, 386 U.S.  
66, 117 (1967) (Harlan, J., dissenting). Furthermore, a rule that  
the prosecutor commits error by any failure to disclose evidence  
favorable to the accused, no matter how insignificant, would

(continued...)

1 favorable to the accused that, if suppressed, would deprive  
 2 the defendant of a fair trial: "For unless the omission  
 3 deprived the defendant of a fair trial, there was no  
 4 constitutional violation requiring that the verdict be set  
 5 aside; and **absent a constitutional violation, there was no  
 6 breach of the prosecutor's constitutional duty to disclose .  
 7 . . but to reiterate a critical point, the prosecutor will  
 8 not have violated his constitutional duty of disclosure  
 9 unless his omission is of sufficient significance to result  
 10 in the denial of the defendant's right to a fair trial."**

11 United States v. Bagley, 473 U.S. at 675 (quoting United States v.  
 12 Agurs, 427 U.S. at 108) (emphasis added); see also Pennsylvania v.  
 13 Richie, 480 U.S. at 59 ("A defendant's right to discover  
 14 exculpatory evidence does not include the unsupervised authority  
 15 to search through the Commonwealth's files."). Accordingly, the  
 16 Government in this case will comply with the Brady mandate but  
 17 rejects any affirmative duty to create or seek out evidence for  
 18 the defense.

19 **b. Disclosure Of Witness Information Should Be**  
 20 **Denied Except As Is Agreed To By The**  
 21 **Government**

22 Regarding Government witnesses, the Government will provide  
 23 Defendant with the following items prior to any such individual's  
 24 trial testimony:

25 (1) The terms of all agreements (or any other  
 26 inducements) it has made with cooperating witnesses, if they are  
 27 entered into;

28 

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<sup>5</sup>(...continued)

impose an impossible burden on the prosecutor and would undermine  
 the interest in the finality of judgements.

1 (2) All relevant exculpatory evidence  
2 concerning the credibility or bias of Government witnesses as  
3 mandated by law; and,

4 (3) Any record of prior criminal convictions  
5 that could be used to impeach a Government witness.

6 The Government opposes disclosure of rap sheet information of  
7 any Government witness prior to trial because of the prohibition  
8 contained in the Jencks Act. See United States v. Taylor,  
9 542 F.2d 1023, 1026 (8th Cir. 1976), cert. denied, 429 U.S. 1074  
10 (1977). Furthermore, any uncharged prior misconduct attributable  
11 to Government witnesses, all promises made to and consideration  
12 given to witnesses by the Government, and all threats of  
13 prosecution made to witnesses by the Government will be disclosed  
14 if required by the doctrine of Brady v. Maryland, 373 U.S. 83  
15 (1963) and Giglio v. United States, 450 U.S. 150 (1972).

16 **c. The Rough Notes Of Our Agents**

17 Although the Government has no objection to Defendant's  
18 motion for the preservation of agents' handwritten notes, we  
19 object to their production at this time. Further, the Government  
20 objects to any pretrial hearing concerning the production of rough  
21 notes. If during any evidentiary proceeding, certain rough notes  
22 become relevant, these notes will be made available.

23 Prior production of these notes is not necessary because they  
24 are not "statements" within the meaning of the Jencks Act unless  
25 they comprise both a substantially verbatim narrative of a  
26 witness' assertions and they have been approved or adopted by the

witness. United States v. Spencer, 618 F.2d 605, 606-07 (9th Cir. 1980); see also United States v. Kaiser, 660 F.2d 724, 731-32 (9th Cir. 1981); United States v. Griffin, 659 F.2d 932, 936-38 (9th Cir. 1981).

**d. Government Reports, Summaries, And Memoranda**

Rule 16, in pertinent part, provides:

[T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agent in connection with the investigating or prosecuting of the case.

Rule 16(a)(2); see also United States v. Sklaroff, 323 F. Supp. 296, 309 (S.D. Fla. 1971), and cases cited therein (emphasis added); United States v. Garrison, 348 F. Supp. 1112, 1127-28 (E.D. La. 1972).

The Government, as expressed previously, recognizes and embraces its obligations pursuant to Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 450 U.S. 150 (1972), Rule 16, and the Jencks Act.<sup>6/</sup> We shall not, however, turn over internal memoranda or reports which are properly regarded as work product exempted from pretrial disclosure.<sup>7/</sup> Such disclosure is supported

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<sup>6/</sup> Summaries of witness interviews conducted by Government agents (DEA 6, FBI 302) are not Jencks Act statements. United States v. Claiborne, 765 F.2d 784, 801 (9th Cir. 1985). The production of witness interview is addressed in more detail below.

<sup>7/</sup> The Government recognizes that the possibility remains that some of these documents may become discoverable during the course of the trial if they are material to any issue that is raised.

neither by the Rules of Evidence nor case law and could compromise other areas of investigation still being pursued.

**e. Defendants Are Not Entitled To Addresses And Phone Numbers Of Government Witnesses**

Defendant requests the name and last known address of each prospective Government witness. While the Government may supply a tentative witness list with its trial memorandum, it objects to providing home addresses. See United States v. Sukumolachan, 610 F.2d 685, 688 (9th Cir. 1980), and United States v. Conder, 423 F.2d 904, 910 (9th Cir. 1970) (addressing defendant's request for the addresses of actual Government witnesses). A request for the home addresses of Government witnesses is tantamount to a request for a witness list and, in a non-capital case, there is no legal requirement that the Government supply defendant with a list of the witnesses it expects to call at trial. United States v. Thompson, 493 F.2d 305, 309 (9th Cir.), cert. denied, 419 U.S. 835 (1974); United States v. Glass, 421 F.2d 832, 833 (9th Cir. 1969).<sup>8/</sup>

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<sup>8/</sup> Even in a capital case, the defendant is only entitled to receive a list of witnesses three days prior to commencement of trial. 18 U.S.C. § 3432. See also United States v. Richter, 488 F.2d 170 (9th Cir. 1973) (holding that defendant must make an affirmative showing as to need and reasonableness of such discovery). Likewise, agreements with witnesses need not be turned over prior to the testimony of the witness, United States v. Rinn, 586 F.2d 1113 (9th Cir. 1978), and there is no obligation to turn over the criminal records of all witnesses. United States v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976); United States v. Egger, 509 F.2d 745 (9th Cir.), cert. denied, 423 U.S. 842 (1975); United States v. Cosby, 500 F.2d 405 (9th Cir. 1974).

1           The Ninth Circuit addressed this issue in United States v.  
2 Jones, 612 F.2d 453 (9th Cir. 1979), cert. denied, 445 U.S. 966  
3 (1980). In Jones, the court made it clear that, absent a showing  
4 of necessity by the defense, there should be no pretrial  
5 disclosure of the identity of Government witnesses. Id. at 455.  
6 Several other Ninth Circuit cases have reached the same  
7 conclusion. See, e.g., United States v. Armstrong, 621 F.2d 951,  
8 1954 (9th Cir. 1980); United States v. Sukumolachan, 610 F.2d at  
9 687; United States v. Paseur, 501 F.2d 966, 972 (9th Cir. 1974)  
10 ("A defendant is not entitled as a matter of right to the name and  
11 address of any witness.").

12                           **f.   Motion Pursuant To Rule 12(d)**

13           Defendant is hereby notified that the Government intends to  
14 use in its case-in-chief at trial all evidence which Defendant is  
15 entitled to discover under Rule 16, subject to any relevant  
16 limitations prescribed in Rule 16.

17                           **g.   Defendant's Motion For Disclosure Of**  
18                           **Oral Statements Made To Non-Government**  
19                           **Witnesses Should Be Denied**

20           Defendants are not entitled to discovery of oral statements  
21 made by them to persons who were not - at the time such statements  
22 were made - known by the defendants to be Government agents. The  
23 plain language of Rule 16 supports this position. Rule 16  
24 unambiguously states that defendants are entitled to "written and  
25 recorded" statements made by them. The rule limits discovery of  
26 oral statements to "that portion of any written record containing  
27 the substance of any relevant oral statement made by the defendant  
28

1 whether before or after arrest in response to interrogation by any  
2 person then known to the defendant to be a Government agent," and  
3 "the substance of any other relevant oral statement made by the  
4 defendant whether before or after arrest in response to  
5 interrogation by any person then known by the defendant to be a  
6 Government agent if the Government intends to use that statement  
7 at trial." The statutory language clearly means that oral  
8 statements are discoverable only in very limited circumstances,  
9 and then, only when made to a known Government agent.

10 **h. Personnel Files of Federal Agents**

11 Pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir.  
12 1991), and United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984),  
13 the Government agrees to review the personnel files of its federal  
14 law enforcement witnesses and to "disclose information favorable  
15 to the defense that meets the appropriate standard of materiality  
16 . . . ." United States v. Cadet, 727 F.2d at 1467-68. Further,  
17 if counsel for the United States is uncertain about the  
18 materiality of the information within its possession, the material  
19 will be submitted to the court for in-camera inspection and  
20 review. In this case, the Government will ask the affected law  
21 enforcement agency to conduct the reviews and report their  
22 findings to the prosecutor assigned to the case. In United States  
23 v. Jennings, 960 F.2d 1488 (9th Cir. 1992), the Ninth Circuit held  
24 that the Assistant U.S. Attorney assigned to the prosecution of  
25 the case has no duty to personally review the personnel files of  
26 federal law enforcement witnesses. In Jennings, the Ninth Circuit  
27

1 found that the present Department of Justice procedures providing  
2 for a review of federal law enforcement witness personnel files by  
3 the agency maintaining them is sufficient compliance with  
4 Henthorn. Jennings, 960 F.2d at 1492. In this case, the  
5 Government will comply with the procedures as set forth in  
6 Jennings.

7 Finally, the Government has no duty to examine the personnel  
8 files of state and local officers because they are not within the  
9 possession, custody or control of the Federal Government. United  
10 States v. Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992).

11 **i. Reports Of Witness Interviews**

12 Defendant has requested the production of all reports  
13 generated in connection with witness interviews. To date, the  
14 Government does not have any reports regarding witness interviews  
15 or otherwise that have not been turned over to Defendant.  
16 However, to the extent that such additional reports regarding  
17 witness interviews are generated, the information sought by  
18 Defendant is not subject to discovery under the Jencks Act, 18  
19 U.S.C., Section 3500. In Jencks v. United States, 353 U.S. 657  
20 (1957), the Supreme Court held that a criminal defendant had a due  
21 process right to inspect, for impeachment purposes, statements  
22 which had been made to government agents by government witnesses.  
23 Such statements were to be turned over to the defense at the time  
24 of cross-examination if their contents related to the subject  
25 matter of the witness' direct testimony, and if a demand had been  
26 made for specific statements of the witness. Id. at 1013-15. The

1 Jencks Act, 18 U.S.C., Section 3500, was enacted in response to  
2 the Jencks decision. As the Supreme Court stated in an early  
3 interpretation of the Jencks Act:

4 Not only was it strongly feared that disclosure of memoranda  
5 containing the investigative agent's interpretations and  
6 impressions might reveal the inner workings of the  
7 investigative process and thereby injure the national  
8 interest, but it was felt to be grossly unfair to allow the  
9 defense to use statements to impeach a witness which could  
10 not fairly be said to be the witness' own rather than the  
11 product of the investigator's selections, interpretations,  
12 and interpolations.

13 Palermo v. United States, 360 U.S. 343, 350 (1959). Having  
14 examined the legislative history and intent behind enactment of  
15 the Jencks Act, the Court concluded, "[t]he purpose of the Act,  
16 its fair reading and its overwhelming legislative history compel  
17 us to hold that statements of a government witness made to an  
18 agent of the government which cannot be produced under the terms  
19 of 18 U.S.C. § 3500, cannot be produced at all."

20 Reports generated in connection with a witness's interview  
21 session are only subject to production under the Jencks Act if the  
22 witness signed the report, or otherwise adopted or approved the  
23 contents of the report. See 18 U.S.C. § 3500(e)(1); see also  
24 United States v. Miller, 771 F.2d 1219, 1231-31 (9th Cir. 1985)  
25 ("The Jencks Act is, by its terms, applicable only to writings  
26 which are signed or adopted by a witness and to accounts which are  
27 substantially verbatim recitals of a witnesses' oral  
28 statements."); United States v. Friedman, 593 F.2d 109, 120 (9th  
Cir. 1979) (an interview report that contains a summary of a  
witness' statements is not subject to discovery under the Jencks

1 Act); United States v. Augenblick, 393 U.S. 248, 354-44 (1969)  
2 (rough notes of witness interview not a "statement" covering  
3 entire interview). Indeed, "both the history of the [Jencks Act]  
4 and the decisions interpreting it have stressed that for  
5 production to be required, the material should not only reflect  
6 the witness' own words, but should also be in the nature of a  
7 complete recital that eliminates the possibility of portions being  
8 selected out of context." United States v. Bobadilla-Lopez, 954  
9 F.2d 519, 522 (9th Cir. 1992). As recognized by the Supreme  
10 Court, "the [Jencks Act] was designed to eliminate the danger of  
11 distortion and misrepresentation inherent in a report which merely  
12 selects portions, albeit accurately, from a lengthy oral recital."  
13 Id. The defendant should not be allowed access to reports which  
14 they cannot properly use to cross-examine the Government's  
15 witnesses.

16 **j. Expert Witnesses**

17 The Government will disclose to Defendant the name,  
18 qualifications, and a written summary of testimony of any expert  
19 the Government intends to use during its case-in-chief at trial  
20 three weeks before the trial date.

21 **k. Other Discovery Requests**

22 To the extent that the above does not answer all of  
23 Defendant's discovery requests, the Government opposes the motions  
24 on the grounds that there is no authority requiring us to provide  
25 such material.

26 //



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) Case No. 08CR1181-WQH  
)  
Plaintiff, )  
)  
v. )  
) CERTIFICATE OF SERVICE  
ANGEL RIOS, )  
)  
)  
Defendant. )  
\_\_\_\_\_)

IT IS HEREBY CERTIFIED THAT:

I, PETER J. MAZZA, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the Government's Response in Opposition to Defendant's Discovery motion on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Timothy Garrison, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 14, 2008.

s/ Peter J. Mazza  
PETER J. MAZZA

1  
2  
3  
4  
5 **UNITED STATES DISTRICT COURT**  
6 **SOUTHERN DISTRICT OF CALIFORNIA**  
7

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 MANUEL MARTINEZ-COVARRUBIAS,

12 Defendant.

CASE NO. 07cr0491 BTM

**ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS THE  
INDICTMENT**

13  
14 Defendant Manuel Martinez-Covarrubias has filed a Motion to Dismiss the Indictment  
15 Due to Erroneous Grand Jury Instruction. For the reasons discussed below, Defendant's  
16 motion is **DENIED**.

17 **I. BACKGROUND**

18 On February 28, 2007, a federal grand jury empaneled in this district on January 11,  
19 2007 returned a two-count Indictment charging Defendant with Importation of  
20 Methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, and Possession of  
21 Methamphetamine with Intent to Distribute, in violation of 21 U.S.C. § 841(a)(1).  
22

23 **II. CHALLENGED INSTRUCTIONS**

24 A. Video Presentation

25 Prior to the selection of the grand jury jury, the potential grand jurors were shown a  
26 video titled "The Federal Grand Jury: The People's Panel." The video's apparent purpose  
27 is to educate potential grand jurors about their civic duty to serve, the function of the grand  
28 jury, and their responsibilities as grand jurors.

1 The video presents the story of a woman who serves on a grand jury for the first time.  
 2 In one scene, after the woman receives the summons, her son tells her what he has learned  
 3 about the function of a grand jury. Reading from a civics book, the son states that if the “jury  
 4 finds that probable cause does exist, then it will return a written statement of charges called  
 5 an indictment . . . .”

6 When charging the impaneled grand jury, the fictional judge explains that if the grand  
 7 jury finds that there is probable cause, “you will return an indictment.”

8 Later, the foreperson tells the other grand jurors that there are two purposes of the  
 9 grand jury: (1) when there is a finding of probable cause, to bring the accused to trial fairly  
 10 and swiftly; and (2) to protect the innocent against unfounded prosecution.

#### 11 12 B. Voir Dire Session

13 Before commencing voir dire, the empaneling judge, the Hon. Larry A. Burns,  
 14 explained the function of the grand jury to the prospective jurors as follows: “The grand jury  
 15 is determining really two factors: ‘Do we have a reasonable – collectively, do we have a  
 16 reasonable belief that a crime was committed? And second, do we have a reasonable belief  
 17 that the person that they propose that we indict committed the crime?’ If the answer is ‘yes’  
 18 to both of those, then the case should move forward. If the answer to either of the questions  
 19 is ‘no,’ then the grand jury should hesitate and not indict.” App. 2 to Gov’t Response at 8.

20 During voir dire, Judge Burns explained to the potential grand jurors that the  
 21 presentation of the evidence to the grand jury was going to be one-sided. Id. at 14.  
 22 However, Judge Burns stated, “Now, having told you that, my experience is that the  
 23 prosecutors don’t play hide-the-ball. If there’s something adverse or that cuts against the  
 24 charge, you’ll be informed of that. They have a duty to do that.” Id. at 14-15.

25 One prospective juror, a retired clinical social worker, indicated that he did not believe  
 26 that any drugs should be considered illegal. Id. at 16. He also stated that he had strong  
 27 feelings about immigration cases and thought the government was spending a lot of time  
 28 unnecessarily persecuting people. Id. The following exchange occurred:

1 The Court: Now, the question is can you fairly evaluate those cases? Just as  
 2 the Defendant ultimately is entitled to a fair trial and the person that's accused  
 3 is entitled to a fair appraisal of the evidence of the case that's in front of you,  
 4 so, too, is the United States entitled to a fair judgment. If there's probable  
 5 cause, then the case should go forward. I wouldn't want you to say, "Well,  
 6 yeah, there's probable cause. But I still don't like what our Government is  
 7 doing. I disagree with these laws, so I'm not going to vote for it to go forward."  
 8 If that's your frame of mind, then probably you shouldn't serve. Only you can  
 9 tell me that.

10 Prospective Juror: Well, I think I may fall in that category.

11 The Court: In the latter category?

12 Prospective Juror: Yes.

13 The Court: Where it would be difficult for you to support a charge even if you  
 14 thought the evidence warranted it?

15 Prospective Juror: Yes.

16 The Court: I'm going to excuse you, then. I appreciate your honest answers.

17 Id. at 16-17.

18 Later, another prospective juror, a real estate agent, expressed a concern regarding  
 19 the disparity between state and federal law with respect to medical marijuana. Judge Burns  
 20 responded:

21 Well, those things – the consequences of your determination shouldn't concern  
 22 you in the sense that penalties or punishment, things like that – we tell trial  
 23 jurors, of course, that they cannot consider the punishment or the  
 24 consequence that Congress has set for these things. We'd ask you to also  
 25 abide by that. We want you to make a business-like decision and look at the  
 26 facts and make a determination of whether there was a [sic] probable cause.

27 Id. at 25.

28 Subsequently, the prospective juror stated that he felt that drugs should be legal and  
 that rapists and murderers, not people using drugs, should go to jail. Id. at 25-26. The  
 following exchange ensued:

The Court: I think rapists and murderers ought to go to jail too. It's not for me  
 as a judge to say what the law is. We elect legislators to do that. We're sort  
 of at the end of the pipe on that. We're charged with enforcing the laws that  
 Congress gives us.

I can tell you sometimes I don't agree with some of the legal decisions  
 that are indicated that I have to make. But my alternative is to vote for  
 someone different, vote for someone that supports the policies I support and  
 get the law changed. It's not for me to say, "Well, I don't like it. So I'm not  
 going to follow it here."

You'd have a similar obligation as a grand juror even though you might

1 have to grit your teeth on some cases. Philosophically, if you were a member  
2 of congress, you'd vote against, for example, criminalizing marijuana. I don't  
know if that's it but you'd vote against criminalizing some drugs.

3 That's not what your prerogative is here. Your prerogative instead is to  
4 act like a judge and to say, "All right. This is what I've got to deal with  
objectively. Does it seem to me that a crime was committed? Yes. Does it  
5 seem to me that this person's involved? It does." And then your obligation, if  
you find those things to be true, would be to vote in favor of the case going  
forward.

6 I can understand if you tell me, "Look, I get all that, but I just can't do it  
or I wouldn't do it." I don't know what your frame of mind is. You have to tell  
me about that.

7 Prospective Juror: I'm not comfortable with it.

8 The Court: Do you think you'd be inclined to let people go on drug cases even  
9 though you were convinced there was probable cause they committed a drug  
offense?

10 Prospective Juror: It would depend upon the case.

11 The Court: Is there a chance that you would do that?

12 Prospective Juror: Yes.

13 The Court: I appreciate your answers. I'll excuse you at this time.

14 Id. at 26-28.

15 Later, a potential juror said that he was "soft" on immigration because he had done  
16 volunteer work with immigrants in the field, but that he could be fair and objective. Judge  
17 Burns stated: "As you heard me explain earlier to one of the prospective grand jurors, we're  
18 not about trying to change people's philosophies and attitudes here. That's not my business.  
19 But what I have to insist on is that you follow the law that's given to us by the United States  
20 Congress. We enforce the federal laws here." Id. at 61. This juror was not excused.

### 21 C. Charge to Impaneled Grand Jury

22 After the grand jury was impaneled, Judge Burns gave further instructions regarding  
23 the responsibilities of the grand jurors.

24 With respect to the enforcement of federal laws, Judge Burns explained:

25 But it's not for you to judge the wisdom of the criminal laws enacted by  
26 Congress; that is, whether or not there should be a federal law or should not  
27 be a federal law designating certain activity is [sic] criminal is not up to you.  
That's a judgment that Congress makes.

28 And if you disagree with that judgment made by Congress, then your

option is not to say, 'Well, I'm going to vote against indicting even though I think that the evidence is sufficient' or 'I'm going to vote in favor of [indictment] even though the evidence may be insufficient.' Instead, your obligation is to contact your congressman or advocate for a change in the laws, but not to bring your personal definition of what the law ought to be and try to impose that through applying it in a grand jury setting.

Furthermore, when you're deciding whether to indict or not to indict, you shouldn't be concerned with punishment that attaches to the charge. I think I also alluded to this in the conversation with one gentleman. Judges alone determine punishment. We tell trial juries in criminal cases that they're not to be concerned with the matter of punishment either. Your obligation at the end of the day is to make a business-like decision on facts and apply those facts to the law as it's explained and read to you.

App. 1 to Gov't Response at 8-9.

With respect to exculpatory evidence, Judge Burns stated: "As I told you, in most instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence." Id. at 20. Later, Judge Burns said, "If past experience is any indication of what to expect in the future, then you can expect that the U.S. Attorneys that will appear in front of you will be candid, they'll be honest, that they'll act in good faith in all matters presented to you." Id. at 27.

### III. DISCUSSION

#### A. Instructions Re: Role of Grand Jury

Defendant contends that statements made in the video, Judge Burns' instructions, and the dismissal of two potential jurors deprived Defendant of the traditional functioning of the Grand Jury. Specifically, Defendant claims that the challenged statements in combination with the dismissal of the two potential jurors "flatly prohibited grand jurors from exercising their constitutional discretion to not indict even if probable cause supports the charge." (Def.'s Reply Br. 8.) Looking at the video presentation and the instructions as a whole, the Court disagrees.

Judge Burns made it clear that the jurors were not to refuse to indict in the face of probable cause *on the ground that they disagreed with Congress's decision to criminalize certain activity*. Judge Burns did not err in doing so. In United States v. Navarro-Vargas, 408

1 F.3d 1184 (9th Cir. 2005) (“Navarro-Vargas II”), the Ninth Circuit upheld the model grand jury  
 2 instruction that states: “You cannot judge the wisdom of the criminal laws enacted by  
 3 Congress, that is, whether or not there should or should not be a federal law designating  
 4 certain activity as criminal. That is to be determined by Congress and not by you.” The  
 5 majority opinion observed that the instruction was not contrary to any long-standing historical  
 6 practice surrounding the grand jury and noted that shortly after the adoption of the Bill of  
 7 Rights, federal judges charged grand juries with a duty to submit to the law and to strictly  
 8 enforce it. *Id.* at 1193, 1202-03. “We cannot say that the grand jury’s power to judge the  
 9 wisdom of the laws is so firmly established that the district court must either instruct the jury  
 10 on its power to nullify the laws or remain silent.” *Id.* at 1204.

11 A prohibition against judging the wisdom of the criminal laws enacted by Congress  
 12 amounts to the same thing as a prohibition against refusing to indict based on disagreement  
 13 with the laws. It is true that Judge Burns used stronger language that, viewed in isolation,  
 14 could be misconstrued as requiring the return of an indictment in *all* cases where probable  
 15 cause can be found. Particularly troubling is the following statement made to the real estate  
 16 agent: “Your prerogative instead is to act like a judge and to say, ‘All right. This is what I’ve  
 17 got to deal with objectively. Does it seem to me that a crime was committed? Yes. Does  
 18 it seem to me that this person’s involved? It does.’ *And then your obligation*, if you find  
 19 those things to be true, *would be to vote in favor of the case going forward.*” App. 2 to Gov’t  
 20 Response at 26. However, viewed in context, Judge Burns was not mandating the issuance  
 21 of an indictment in *all* cases where probable cause is found; he was explaining that  
 22 disagreement with the laws should not be an obstacle to the issuance of an indictment.<sup>1</sup>

23 Furthermore, the word “obligation” is not materially different than the word “should.”

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24  
 25 <sup>1</sup> The Supreme Court has recognized that a grand jury is not required to indict in  
 26 every case where probable cause exists. In *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986),  
 27 the Supreme Court explained: “The grand jury does not determine only that probable cause  
 28 exists to believe that a defendant committed a crime, or that it does not. In the hands of the  
 grand jury lies the power to charge a greater offense or a lesser offense; numerous counts  
 or a single count; and perhaps most significant of all, a capital offense or a noncapital offense  
 - all on the basis of the same facts. Moreover, ‘[t]he grand jury is not bound to indict in every  
 case where a conviction can be obtained.’ *United States v. Ciambrone*, 601 F.2d 616, 629  
 (2d Cir. 1979) (Friendly, J., dissenting).”

1 In Navarro-Vargas II, the majority opinion held that the model instruction that the jurors  
 2 “should” indict if they find probable cause does not violate the grand jury’s independence.  
 3 The majority explained, “As a matter of pure semantics, it does not ‘eliminate discretion on  
 4 the part of the grand jurors,’ leaving room for the grand jury to dismiss even if it finds  
 5 probable cause.” Navarro-Vargas II, 408 F.3d at 1205 (quoting United States v. Marcucci,  
 6 299 F.3d 1156, 1159 (9th Cir. 2002)). The dissenting opinion notes that the word “should”  
 7 is used “to express a duty [or] *obligation*.” *Id.* at 1121 (quoting The Oxford American Diction  
 8 And Language Guide 931 (1999))(emphasis added).<sup>2</sup>

9 Defendant points to the language in the video where first the son, then the judge, state  
 10 that if there is a finding of probable cause, the grand jury “will” return an indictment.  
 11 However, no emphasis is placed on the word “will.” As spoken by the actors, the statements  
 12 are not directives, mandating the return of an indictment upon the finding of probable cause,  
 13 but, rather, descriptions of what is expected to occur. Similarly, the foreperson’s statement  
 14 that one of the purposes of the grand jury is to bring an accused to trial when there is a  
 15 finding of probable cause is a general statement of the grand jury’s function, not a command  
 16 to return an indictment in *every* case where probable cause exists.

17 Defendant also argues that Judge Burns improperly forbade the grand jury from  
 18 considering the potential punishment for crimes when deciding whether or not to indict.  
 19 Defendant relies on the following statement:

20 Well, those things – the consequences of your determination shouldn’t concern  
 21 you in the sense that penalties or punishment, things like that – we tell trial  
 22 jurors, of course, that they cannot consider the punishment or the  
 23 consequence that Congress has set for these things. *We’d ask you to also*  
*abide by that.* We want you to make a business-like decision and look at the  
 facts and make a determination of whether there was a probable cause.

24 App. 2 to Gov’t Response at 25. (Emphasis added.) Although Judge Burns stated that trial  
 25 jurors *cannot* consider punishment, he did not impose such a restriction on the grand jurors.  
 26 Instead, Judge Burns *requested* that the grand jurors follow the same principle. Similarly,

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27  
 28 <sup>2</sup> Defendant concedes that at other times Judge Burns instructed that upon a finding  
 of probable cause, the case “should” go forward. App. 2 to Gov’t Response at 8, 17; App.  
 1 to Gov’t Response at 4, 23.

1 during the formal charge, Judge Burns stated, “[y]ou *shouldn’t* be concerned with punishment  
2 that attaches to the charge.” App. 1 to Gov’t Response at 8. (Emphasis added.)

3 In United States v. Cortez-Rivera, 454 F.3d 1038 (9th Cir. 2006), the Ninth Circuit  
4 upheld a jury instruction that stated: “[W]hen deciding whether or not to indict, you *should not*  
5 be concerned about punishment in the event of conviction; judges alone determine  
6 punishment.” (Emphasis added.) Consistent with the reasoning in Marcucci and Navarro-  
7 Vargas II, the Ninth Circuit held that the instruction did not place an absolute bar on  
8 considering punishment and was therefore constitutional. The instructions given by Judge  
9 Burns regarding the consideration of punishment were substantially the same as the  
10 instruction in Cortez-Rivera.

11 Neither Judge Burns nor the video pronounced a general prohibition against jurors  
12 exercising their discretion to refuse to return an indictment in the face of probable cause.  
13 In any case, “history demonstrates that grand juries do not derive their independence from  
14 a judge’s instruction. Instead they derive their independence from an unreviewable power  
15 to decide whether to indict or not.” Navarro-Vargas II, 408 F.3d at 1204.

16 Both the video and Judge Burns informed the jurors about the utmost secrecy of the  
17 grand jury proceedings and their deliberations. The video and Judge Burns also emphasized  
18 to the jury that they were independent of the Government and did not have to return an  
19 indictment just because the Assistant U.S. Attorney asked them to. In the video, the judge  
20 expressed approval at the fact that the grand jury did not return an indictment as to the  
21 alleged driver of the get-away car. Judge Burns characterized the jury as “a buffer between  
22 our Government’s ability to accuse someone of a crime and then putting that person through  
23 the burden of standing trial.” App. 1 to Gov’t Response at 26. Judge Burns also told the  
24 jurors that they were not to be a “rubber stamp” and were expected to depend on their  
25 independent judgment. Id. at 27.

26 Even though the jurors were not explicitly instructed that they could use their  
27 discretion to refuse to return an indictment, they retained that power by virtue of the secrecy  
28 surrounding their deliberations and the unreviewability of their decisions. Nothing that Judge

1 Burns said or did impinged on the jurors' independence in this regard.

2 Defendant counters that the dismissal of the two potential jurors undermined the grand  
3 jury's independence from the very start. According to Defendant, when Judge Burns  
4 dismissed the jurors, the message was clear that they were to indict in every case where  
5 there was probable cause or they would be excused. Defendant contends that the remaining  
6 grand jurors could not have understood Judge Burns' actions in any other way. (Reply Br.  
7 18.) The Court disagrees.

8 Upon reading the voir dire transcript, it is apparent that the jurors were excused  
9 because they were biased against the government with respect to a whole category of  
10 criminal laws, not simply because they were independent-minded and might refuse to return  
11 an indictment in a case where probable cause exists. Judge Burns explained to the clinical  
12 social worker, "We're all products of our experience. We're not going to try to disabuse you  
13 of experiences or judgments that you have. What we ask is that you not allow those to  
14 control invariably the outcome of the cases coming in front of you; that you look at the cases  
15 fresh, you evaluate the circumstances, listen to the witness testimony, and then make an  
16 independent judgment." App. 2 to Gov't Response at 15. Judge Burns excused the social  
17 worker after he admitted that it would be difficult for him to return an indictment in drug or  
18 immigration cases.

19 Similarly, the real estate agent expressed that he thought drugs should be legal and  
20 that people using drugs should not be sent to jail. App. 2 to Gov't Response at 25-26. The  
21 real estate agent said that he was not comfortable with indicting in drug cases. Although he  
22 did not say that he would refuse to indict in all cases involving drugs, he admitted that  
23 because of his beliefs, there was a chance that he would refuse to return an indictment in a  
24 drug case even though there was probable cause. Id. at 27. The real estate agent's  
25 responses established that he had serious concerns regarding the criminalization of drugs  
26 and could not be impartial with respect to these cases

27 That bias was the reason for the dismissal of the first two potential jurors is confirmed  
28 by the dismissal of a third potential juror. This juror stated that he had a strong bias for the

1 Government. App. 2 to Gov't Response at 38. Judge Burns cautioned the juror that he  
2 should not "automatically defer to [the Government] or surrender the function and give the  
3 indictment decision to the U.S. Attorney. You have to make that independently." Id. at 40.  
4 Judge Burns emphasized once again the responsibility of the jurors to evaluate the facts of  
5 each case independently based on the evidence presented. Id. at 42-43. Demonstrating his  
6 even-handedness, Judge Burns explained, "I'm equally concerned with somebody who would  
7 say, 'I'm going to automatically drop the trap door on anybody the U.S. Attorney asks.' I  
8 wouldn't want you to do that." Id. at 44.

9 A reasonable grand juror would not have interpreted the dismissal of the first two  
10 potential jurors as a message that they must indict in all cases where probable cause is  
11 found or risk being excused from service. It was apparent to the other jurors that a lack of  
12 impartiality with respect to certain types of cases, *not* independence, was the reason for all  
13 three dismissals.

14 In sum, Judge Burns did not err in instructing the grand jurors that they were not to  
15 refuse to return an indictment on the ground that they disagreed with the laws. Furthermore,  
16 nothing in the video or Judge Burns' instructions nullified the grand jury's inherent power to  
17 refuse to indict for any reason whatsoever. As the Ninth Circuit noted in Navarro-Vargas II,  
18 408 F.3d at 1204, the grand jury's independence results from the secrecy of their  
19 deliberations and the unreviewability of their decisions. Nothing in the record shows any  
20 impediment to that independence.

21  
22 B. Instructions re: Assistant U.S. Attorneys

23 Defendant also contends that Judge Burns committed structural error by making  
24 comments about the Assistant U.S. Attorney's duty to present evidence that "cuts against the  
25 charge." According to Defendant, not only did Judge Burns' comments contradict United  
26 States v. Williams, 504 U.S. 36 (1992), but also discouraged independent investigation,  
27 leading to inaccurate probable cause determinations. Defendant reasons that given Judge  
28 Burns' comments, the grand jurors would have assumed that if the prosecutor did not present

1 any exculpatory evidence, then none exists, rendering further investigation a waste of time.

2 Under Williams, prosecutors do not have a duty to present substantial exculpatory  
3 evidence to the grand jury. Although Assistant U.S. Attorneys apparently have an  
4 employment duty to disclose “substantial evidence that directly negates the guilt” of a subject  
5 of investigation (United States Attorneys’ Manual § 9-11.233), it does not appear that they  
6 have a broad duty to disclose all evidence that may be deemed exculpatory or adverse to  
7 the Government’s position.

8 Accordingly, Judge Burns’ comments regarding the duty of Assistant U.S. Attorneys  
9 to present adverse evidence were inaccurate. However, Judge Burns’ comments do not rise  
10 to the level of structural error. As discussed above, the video and Judge Burns stressed that  
11 the grand jury was independent of the Government. The video and Judge Burns also  
12 explained to the jury that they could direct the Assistant U.S. Attorney to subpoena additional  
13 documents or witnesses. App. 1 to Gov’t Response at 11, 24. The jurors were also told  
14 about their right to pursue their own investigation, even if the Assistant U.S. Attorney  
15 disagrees with the grand jury’s decision to pursue the subject. Id. at 12.

16 In light of the foregoing instructions, the Court does not agree that the grand jurors  
17 would assume that if the Government did not present any exculpatory evidence, none exists.  
18 A reasonable juror would understand that the Assistant U.S. Attorney may not be aware of  
19 certain exculpatory evidence, whether due to legitimate circumstances or inadequate  
20 investigation, and that further investigation by the grand jury may be needed to properly  
21 evaluate the evidence before them. Furthermore, Judge Burns told the jury that “in *most*  
22 instances” the U.S. Attorneys are duty-bound to present exculpatory evidence. App. 1 to  
23 Gov’t Response at 20. Based on this qualifying language, the grand jurors would have  
24 understood that the prosecutor is not always bound to present exculpatory evidence. Thus,  
25 “the structural protections of the grand jury” have not “been so compromised as to render the  
26 proceedings fundamentally unfair.” Bank of Nova Scotia v. United States, 487 U.S. 250, 257  
27 (1988).

28 If Defendant can establish that the Government in fact knew of exculpatory evidence

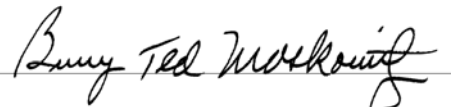
1 that was not presented to the grand jury and that this failure to present exculpatory evidence,  
2 in conjunction with Judge Burns' comments, "substantially influenced the grand jury's  
3 decision to indict" or raises "grave doubt" that the decision to indict was free from the  
4 substantial influence of such events, the Court may dismiss the indictment under its  
5 supervisory powers. Bank of Nova Scotia, 487 U.S. at 256. Therefore, the Court will grant  
6 Defendant leave to conduct discovery regarding what evidence was presented to the grand  
7 jury. If, based upon the discovery, Defendant can establish that he suffered actual prejudice,  
8 Defendant may renew his motion to dismiss the indictment.

9  
10 **IV. CONCLUSION**

11 For the reasons discussed above, Defendant's Motion to Dismiss the Indictment Due  
12 to Erroneous Grand Jury Instruction is **DENIED WITHOUT PREJUDICE**.

13  
14 **IT IS SO ORDERED.**

15 DATED: October 11, 2007

16   
17  
18 Honorable Barry Ted Moskowitz  
United States District Judge

1  
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3  
4  
5 UNITED STATES DISTRICT COURT  
6 SOUTHERN DISTRICT OF CALIFORNIA  
7

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 DIANA JIMENEZ-BERMUDEZ,

12 Defendant.

CASE NO. 07cr1372 JAH

13  
14  
15 **AMENDED ORDER DENYING**  
16 **DEFENDANT'S MOTION TO**  
17 **DISMISS THE INDICTMENT**

18 Defendant Diana Jimenez-Bermudez has filed a Motion to Dismiss the Indictment  
19 Due to Erroneous Grand Jury Instruction. For the reasons discussed below, Defendant's  
20 motion is **DENIED**.

21 **I. BACKGROUND**

22 On February 28, 2007, a federal grand jury empaneled in this district on January  
23 11, 2007 returned a two-count Indictment charging Defendant with Importation of  
24 Methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, and Possession of  
25 Methamphetamine with Intent to Distribute, in violation of 21 U.S.C. § 841(a)(1).  
26

27 **II. CHALLENGED INSTRUCTIONS**<sup>1</sup>

28 **A. Voir Dire Session**

Before commencing voir dire, the empaneling judge, the Hon. Larry A. Burns,  
explained the function of the grand jury to the prospective jurors as follows: "The grand  
jurors were shown a video presentation on the role of the grand jury, however there is no  
substantive challenge to the use of the video, and thus use of the video will not be  
discussed in depth herein."

<sup>1</sup>In her reply brief, Defendant makes a passing reference to the fact that the grand jurors were shown a video presentation on the role of the grand jury, however there is no substantive challenge to the use of the video, and thus use of the video will not be discussed in depth herein.

1 jury is determining really two factors: ‘Do we have a reasonable – collectively, do we have  
 2 a reasonable belief that a crime was committed? And second, do we have a reasonable  
 3 belief that the person that they propose that we indict committed the crime?’ If the  
 4 answer is ‘yes’ to both of those, then the case should move forward. If the answer to either  
 5 of the questions is ‘no,’ then the grand jury should hesitate and not indict.” App. 2 to  
 6 Gov’t Response at 8.

7 During voir dire, Judge Burns explained to the potential grand jurors that the  
 8 presentation of the evidence to the grand jury was going to be one-sided. Id. at 14.  
 9 However, Judge Burns stated, “Now, having told you that, my experience is that the  
 10 prosecutors don’t play hide-the-ball. If there’s something adverse or that cuts against the  
 11 charge, you’ll be informed of that. They have a duty to do that.” Id. at 14-15.

12 One prospective juror, a retired clinical social worker, indicated that he did not  
 13 believe that any drugs should be considered illegal. Id. at 16. He also stated that he had  
 14 strong feelings about immigration cases and thought the government was spending a lot  
 15 of time unnecessarily persecuting people. Id. The following exchange occurred:

16 The Court: Now, the question is can you fairly evaluate those cases? Just  
 17 as the Defendant ultimately is entitled to a fair trial and the person that’s  
 18 accused is entitled to a fair appraisal of the evidence of the case that’s in  
 19 front of you, so, too, is the United States entitled to a fair judgment. If  
 20 there’s probable cause, then the case should go forward. I wouldn’t want you  
 to say, “Well, yeah, there’s probable cause. But I still don’t like what our  
 Government is doing. I disagree with these laws, so I’m not going to vote  
 for it to go forward.” If that’s your frame of mind, then probably you  
 shouldn’t serve. Only you can tell me that.

21 Prospective Juror: Well, I think I may fall in that category.

22 The Court: In the latter category?

23 Prospective Juror: Yes.

24 The Court: Where it would be difficult for you to support a charge even if  
 you thought the evidence warranted it?

25 Prospective Juror: Yes.

26 The Court: I’m going to excuse you, then. I appreciate your honest answers.

27 Id. at 16-17.

28 Later, another prospective juror, a real estate agent, expressed a concern regarding

1 the disparity between state and federal law with respect to medical marijuana. Judge  
2 Burns responded:

3 Well, those things – the consequences of your determination shouldn't  
4 concern you in the sense that penalties or punishment, things like that – we  
5 tell trial jurors, of course, that they cannot consider the punishment or the  
6 consequence that Congress has set for these things. We'd ask you to also  
7 abide by that. We want you to make a business-like decision and look at the  
8 facts and make a determination of whether there was a [sic] probable cause.

9 Id. at 25.

10 Subsequently, the prospective juror stated that he felt that drugs should be legal and  
11 that rapists and murderers, not people using drugs, should go to jail. Id. at 25-26. The  
12 following exchange ensued:

13 The Court: I think rapists and murderers ought to go to jail too. It's not for  
14 me as a judge to say what the law is. We elect legislators to do that. We're  
15 sort of at the end of the pipe on that. We're charged with enforcing the laws  
16 that Congress gives us.

17 I can tell you sometimes I don't agree with some of the legal decisions  
18 that are indicated that I have to make. But my alternative is to vote for  
19 someone different, vote for someone that supports the policies I support and  
20 get the law changed. It's not for me to say, "Well, I don't like it. So I'm not  
21 going to follow it here."

22 You'd have a similar obligation as a grand juror even though you  
23 might have to grit your teeth on some cases. Philosophically, if you were a  
24 member of congress, you'd vote against, for example, criminalizing  
25 marijuana. I don't know if that's it but you'd vote against criminalizing  
26 some drugs.

27 That's not what your prerogative is here. Your prerogative instead is  
28 to act like a judge and to say, "All right. This is what I've got to deal with  
objectively. Does it seem to me that a crime was committed? Yes. Does it  
seem to me that this person's involved? It does." And then your obligation,  
if you find those things to be true, would be to vote in favor of the case going  
forward.

I can understand if you tell me, "Look, I get all that, but I just can't  
do it or I wouldn't do it." I don't know what your frame of mind is. You  
have to tell me about that.

Prospective Juror: I'm not comfortable with it.

The Court: Do you think you'd be inclined to let people go on drug cases  
even though you were convinced there was probable cause they committed  
a drug offense?

Prospective Juror: It would depend upon the case.

The Court: Is there a chance that you would do that?

Prospective Juror: Yes.

The Court: I appreciate your answers. I'll excuse you at this time.

1 Id. at 26-28.

2 Later, a potential juror said that he was “soft” on immigration because he had done  
3 volunteer work with immigrants in the field, but that he could be fair and objective. Judge  
4 Burns stated: “As you heard me explain earlier to one of the prospective grand jurors, we’re  
5 not about trying to change people’s philosophies and attitudes here. That’s not my  
6 business. But what I have to insist on is that you follow the law that’s given to us by the  
7 United States Congress. We enforce the federal laws here.” Id. at 61. This juror was not  
8 excused.

9 **B. Charge to Impaneled Grand Jury**

10 After the grand jury was impaneled, Judge Burns gave further instructions regarding  
11 the responsibilities of the grand jurors.

12 With respect to the enforcement of federal laws, Judge Burns explained:

13 But it’s not for you to judge the wisdom of the criminal laws enacted  
14 by Congress; that is, whether or not there should be a federal law or should  
15 not be a federal law designating certain activity is [sic] criminal is not up to  
16 you. That’s a judgment that Congress makes.

17 And if you disagree with that judgment made by Congress, then your  
18 option is not to say, ‘Well, I’m going to vote against indicting even though  
19 I think that the evidence is sufficient’ or ‘I’m going to vote in favor of  
20 [indictment] even though the evidence may be insufficient.’ Instead, your  
21 obligation is to contact your congressman or advocate for a change in the  
22 laws, but not to bring your personal definition of what the law ought to be  
23 and try to impose that through applying it in a grand jury setting.

24 Furthermore, when you’re deciding whether to indict or not to indict,  
25 you shouldn’t be concerned with punishment that attaches to the charge.  
26 I think I also alluded to this in the conversation with one gentleman. Judges  
27 alone determine punishment. We tell trial juries in criminal cases that  
28 they’re not to be concerned with the matter of punishment either. Your  
obligation at the end of the day is to make a business-like decision on facts  
and apply those facts to the law as it’s explained and read to you.

App. 1 to Gov’t Response at 8-9.

With respect to exculpatory evidence, Judge Burns stated: “As I told you, in most  
instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what  
they may be asking you to do if they’re aware of that evidence.” Id. at 20. Later, Judge  
Burns said, “If past experience is any indication of what to expect in the future, then you  
can expect that the U.S. Attorneys that will appear in front of you will be candid, they’ll  
be honest, that they’ll act in good faith in all matters presented to you.” Id. at 27.

### III. DISCUSSION

#### A. Instructions Re: Role of Grand Jury

Defendant contends that Judge Burns' instructions and the dismissal of two potential jurors deprived Defendant of the traditional functioning of the Grand Jury. Specifically, Defendant claims that the challenged statements in combination with the dismissal of the two potential jurors "flatly prohibited grand jurors from exercising their constitutional discretion to not indict even if probable cause supports the charge." (Def.'s Reply Br. 8.) Looking at the instructions as a whole, the Court disagrees.

Judge Burns made it clear that the jurors were not to refuse to indict in the face of probable cause *on the ground that they disagreed with Congress's decision to criminalize certain activity*. Judge Burns did not err in doing so. In United States v. Navarro-Vargas, 408 F.3d 1184 (9th Cir. 2005) ("Navarro-Vargas II"), the Ninth Circuit upheld the model grand jury instruction that states: "You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you." The majority opinion observed that the instruction was not contrary to any long-standing historical practice surrounding the grand jury and noted that shortly after the adoption of the Bill of Rights, federal judges charged grand juries with a duty to submit to the law and to strictly enforce it. *Id.* at 1193, 1202-03. "We cannot say that the grand jury's power to judge the wisdom of the laws is so firmly established that the district court must either instruct the jury on its power to nullify the laws or remain silent." *Id.* at 1204.

A prohibition against judging the wisdom of the criminal laws enacted by Congress amounts to the same thing as a prohibition against refusing to indict based on disagreement with the laws. It is true that Judge Burns used stronger language that, viewed in isolation, could be misconstrued as requiring the return of an indictment in *all* cases where probable cause can be found. Particularly troubling is the following statement made to the real estate agent: "Your prerogative instead is to act like a judge and to say, 'All right. This is what I've got to deal with objectively. Does it seem to me that a crime

1 was committed? Yes. Does it seem to me that this person's involved? It does.' *And then*  
 2 *your obligation*, if you find those things to be true, *would be to vote in favor of the case going*  
 3 *forward.*" App. 2 to Gov't Response at 26. However, viewed in context, Judge Burns was  
 4 not mandating the issuance of an indictment in *all* cases where probable cause is found;  
 5 he was explaining that disagreement with the laws should not be an obstacle to the  
 6 issuance of an indictment.<sup>2</sup>

7 Furthermore, the word "obligation" is not materially different than the word  
 8 "should." In Navarro-Vargas II, the majority opinion held that the model instruction that  
 9 the jurors "should" indict if they find probable cause does not violate the grand jury's  
 10 independence. The majority explained, "As a matter of pure semantics, it does not  
 11 'eliminate discretion on the part of the grand jurors,' leaving room for the grand jury to  
 12 dismiss even if it finds probable cause." Navarro-Vargas II, 408 F.3d at 1205 (quoting  
 13 United States v. Marcucci, 299 F.3d 1156, 1159 (9th Cir. 2002)). The dissenting opinion  
 14 notes that the word "should" is used "to express a duty [or] *obligation*." Id. at 1121  
 15 (quoting The Oxford American Diction And Language Guide 931 (1999)) (emphasis  
 16 added).<sup>3</sup>

17 Defendant also argues that Judge Burns improperly forbade the grand jury from  
 18 considering the potential punishment for crimes when deciding whether or not to indict.  
 19 Defendant relies on the following statement:

20 Well, those things – the consequences of your determination shouldn't  
 21 concern you in the sense that penalties or punishment, things like that – we  
 tell trial jurors, of course, that they cannot consider the punishment or the

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22  
 23 <sup>2</sup> The Supreme Court has recognized that a grand jury is not required to indict in  
 every case where probable cause exists. In Vasquez v. Hillery, 474 U.S. 254, 263 (1986),  
 24 the Supreme Court explained: "The grand jury does not determine only that probable  
 cause exists to believe that a defendant committed a crime, or that it does not. In the  
 25 hands of the grand jury lies the power to charge a greater offense or a lesser offense;  
 numerous counts or a single count; and perhaps most significant of all, a capital offense  
 26 or a noncapital offense - all on the basis of the same facts. Moreover, '[t]he grand jury is  
 not bound to indict in every case where a conviction can be obtained.' United States v.  
 27 Ciambrone, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)."

28 <sup>3</sup> Defendant concedes that at other times Judge Burns instructed that upon a finding  
 of probable cause, the case "should" go forward. App. 2 to Gov't Response at 8, 17; App.  
 1 to Gov't Response at 4, 23.

1 consequence that Congress has set for these things. *We'd ask you to also abide*  
2 *by that.* We want you to make a business-like decision and look at the facts  
and make a determination of whether there was a probable cause.

3 App. 2 to Gov't Response at 25. (Emphasis added.) Although Judge Burns stated that  
4 trial jurors *cannot* consider punishment, he did not impose such a restriction on the grand  
5 jurors. Instead, Judge Burns *requested* that the grand jurors follow the same principle.  
6 Similarly, during the formal charge, Judge Burns stated, "[y]ou *shouldn't* be concerned with  
7 punishment that attaches to the charge." App. 1 to Gov't Response at 8. (Emphasis  
8 added.)

9 In United States v. Cortez-Rivera, 454 F.3d 1038 (9th Cir. 2006), the Ninth  
10 Circuit upheld a jury instruction that stated: "[W]hen deciding whether or not to indict,  
11 you *should not* be concerned about punishment in the event of conviction; judges alone  
12 determine punishment." (Emphasis added.) Consistent with the reasoning in Marcucci  
13 and Navarro-Vargas II, the Ninth Circuit held that the instruction did not place an  
14 absolute bar on considering punishment and was therefore constitutional. The  
15 instructions given by Judge Burns regarding the consideration of punishment were  
16 substantially the same as the instruction in Cortez-Rivera.

17 Judge Burns did not pronounce a general prohibition against jurors exercising their  
18 discretion to refuse to return an indictment in the face of probable cause. In any case,  
19 "history demonstrates that grand juries do not derive their independence from a judge's  
20 instruction. Instead they derive their independence from an unreviewable power to decide  
21 whether to indict or not." Navarro-Vargas II, 408 F.3d at 1204.

22 Judge Burns informed the jurors about the utmost secrecy of the grand jury  
23 proceedings and their deliberations. In addition, a video shown to the potential grand  
24 jurors titled, "The Federal Grand Jury: The People's Panel," which was intended to educate  
25 potential grand jurors about their responsibilities as grand jurors, also informed the jurors  
26 of the secrecy of the proceedings. Judge Burns and the video also emphasized to the jury  
27 that they were independent of the Government and did not have to return an indictment  
28 just because the Assistant U.S. Attorney asked them to. Judge Burns characterized the

1 jury as “a buffer between our Government’s ability to accuse someone of a crime and then  
2 putting that person through the burden of standing trial.” App. 1 to Gov’t Response at  
3 26. Judge Burns also told the jurors that they were not to be a “rubber stamp” and were  
4 expected to depend on their independent judgment. Id. at 27.

5 Even though the jurors were not explicitly instructed that they could use their  
6 discretion to refuse to return an indictment, they retained that power by virtue of the  
7 secrecy surrounding their deliberations and the unreviewability of their decisions. Nothing  
8 that Judge Burns said or did impinged on the jurors’ independence in this regard.

9 Defendant counters that the dismissal of the two potential jurors undermined the  
10 grand jury’s independence from the very start. According to Defendant, when Judge Burns  
11 dismissed the jurors, the message was clear that they were to indict in every case where  
12 there was probable cause or they would be excused. Defendant contends that the  
13 remaining grand jurors could not have understood Judge Burns’ actions in any other way.  
14 (Reply Br. 18.) The Court disagrees.

15 Upon reading the voir dire transcript, it is apparent that the jurors were excused  
16 because they were biased against the government with respect to a whole category of  
17 criminal laws, not simply because they were independent-minded and might refuse to  
18 return an indictment in a case where probable cause exists. Judge Burns explained to the  
19 clinical social worker, “We’re all products of our experience. We’re not going to try to  
20 disabuse you of experiences or judgments that you have. What we ask is that you not  
21 allow those to control invariably the outcome of the cases coming in front of you; that you  
22 look at the cases fresh, you evaluate the circumstances, listen to the witness testimony, and  
23 then make an independent judgment.” App. 2 to Gov’t Response at 15. Judge Burns  
24 excused the social worker after he admitted that it would be difficult for him to return an  
25 indictment in drug or immigration cases.

26 Similarly, the real estate agent expressed that he thought drugs should be legal and  
27 that people using drugs should not be sent to jail. App. 2 to Gov’t Response at 25-26.  
28 The real estate agent said that he was not comfortable with indicting in drug cases.

1 Although he did not say that he would refuse to indict in all cases involving drugs, he  
2 admitted that because of his beliefs, there was a chance that he would refuse to return an  
3 indictment in a drug case even though there was probable cause. Id. at 27. The real estate  
4 agent's responses established that he had serious concerns regarding the criminalization  
5 of drugs and could not be impartial with respect to these cases

6 That bias was the reason for the dismissal of the first two potential jurors is  
7 confirmed by the dismissal of a third potential juror. This juror stated that he had a  
8 strong bias for the Government. App. 2 to Gov't Response at 38. Judge Burns cautioned  
9 the juror that he should not "automatically defer to [the Government] or surrender the  
10 function and give the indictment decision to the U.S. Attorney. You have to make that  
11 independently." Id. at 40. Judge Burns emphasized once again the responsibility of the  
12 jurors to evaluate the facts of each case independently based on the evidence presented.  
13 Id. at 42-43. Demonstrating his even-handedness, Judge Burns explained, "I'm equally  
14 concerned with somebody who would say, 'I'm going to automatically drop the trap door  
15 on anybody the U.S. Attorney asks.' I wouldn't want you to do that." Id. at 44.

16 A reasonable grand juror would not have interpreted the dismissal of the first two  
17 potential jurors as a message that they must indict in all cases where probable cause is  
18 found or risk being excused from service. It was apparent to the other jurors that a lack  
19 of impartiality with respect to certain types of cases, *not* independence, was the reason for  
20 all three dismissals.

21 In sum, Judge Burns did not err in instructing the grand jurors that they were not  
22 to refuse to return an indictment on the ground that they disagreed with the laws.  
23 Furthermore, nothing in the video or Judge Burns' instructions nullified the grand jury's  
24 inherent power to refuse to indict for any reason whatsoever. As the Ninth Circuit noted  
25 in Navarro-Vargas II, 408 F.3d at 1204, the grand jury's independence results from the  
26 secrecy of their deliberations and the unreviewability of their decisions. Nothing in the  
27 record shows any impediment to that independence.

28 **B. Instructions re: Assistant U.S. Attorneys**

1 Defendant also contends that Judge Burns committed structural error by making  
2 comments about the Assistant U.S. Attorney's duty to present evidence that "cuts against  
3 the charge." According to Defendant, not only did Judge Burns' comments contradict  
4 United States v. Williams, 504 U.S. 36 (1992), but also discouraged independent  
5 investigation, leading to inaccurate probable cause determinations. Defendant reasons  
6 that given Judge Burns' comments, the grand jurors would have assumed that if the  
7 prosecutor did not present any exculpatory evidence, then none exists, rendering further  
8 investigation a waste of time.

9 Under Williams, prosecutors do not have a duty to present substantial exculpatory  
10 evidence to the grand jury. Although Assistant U.S. Attorneys apparently have an  
11 employment duty to disclose "substantial evidence that directly negates the guilt" of a  
12 subject of investigation (United States Attorneys' Manual § 9-11.233), it does not appear  
13 that they have a broad duty to disclose all evidence that may be deemed exculpatory or  
14 adverse to the Government's position.

15 Accordingly, Judge Burns' comments regarding the duty of Assistant U.S. Attorneys  
16 to present adverse evidence were inaccurate. However, Judge Burns' comments do not rise  
17 to the level of structural error. As discussed above, the video and Judge Burns stressed that  
18 the grand jury was independent of the Government. The video and Judge Burns also  
19 explained to the jury that they could direct the Assistant U.S. Attorney to subpoena  
20 additional documents or witnesses. App. 1 to Gov't Response at 11, 24. The jurors were  
21 also told about their right to pursue their own investigation, even if the Assistant U.S.  
22 Attorney disagrees with the grand jury's decision to pursue the subject. Id. at 12.

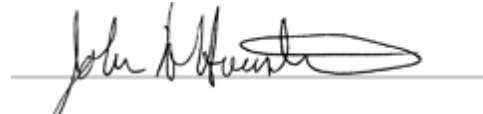
23 In light of the foregoing instructions, the Court does not agree that the grand jurors  
24 would assume that if the Government did not present any exculpatory evidence, none  
25 exists. A reasonable juror would understand that the Assistant U.S. Attorney may not be  
26 aware of certain exculpatory evidence, whether due to legitimate circumstances or  
27 inadequate investigation, and that further investigation by the grand jury may be needed  
28 to properly evaluate the evidence before them. Furthermore, Judge Burns told the jury

1 that “in *most* instances” the U.S. Attorneys are duty-bound to present exculpatory  
2 evidence. App. 1 to Gov’t Response at 20. Based on this qualifying language, the grand  
3 jurors would have understood that the prosecutor is not always bound to present  
4 exculpatory evidence. Thus, “the structural protections of the grand jury” have not “been  
5 so compromised as to render the proceedings fundamentally unfair.” Bank of Nova Scotia  
6 v. United States, 487 U.S. 250, 257 (1988).

7 **IV. CONCLUSION**

8 For the reasons discussed above, Defendant’s Motion to Dismiss the Indictment  
9 Due to Erroneous Grand Jury Instruction is **DENIED**.

10  
11  
12 DATED: December 5, 2007

13   
14 HON. JOHN A. HOUSTON  
15 United States District Judge

16 **IT IS SO ORDERED.**  
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